No. 4050.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

In the Matter of GEORGE S. SPIROPLOS, MILTIADES SPIROPLOS and GUST SPIROPLOS, partners under the firm name of George Spiroplos and Brothers,

Bankrupts,

CHAS. BODEAU, as Trustee in Bankruptcy of the estate of George S. Spiroplos, Miltiades Spiroplos and Gust Spiroplos,

Appellants,

vs.

GEORGE S. SPIROPLOS, MILTIADES SPIROPLOS and GUST SPIROPLOS,

Appellees.

Upon appeal from the United States District Court for the District of Oregon.

RESPONDENTS' BRIEF.

Wm. H. PACKWOOD and J. B. MESSICK, of Baker, Ore.,
Attorneys for Appellees.
A. A. SMITH, of Baker, Oregon,
Attorney for Appellant.

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RESPONDENTS' BRIEF.

STATEMENT OF THE CASE

It is shown by Transcript of record, page 1, that the appellees, bankrupts, filed their petition in

the District Court of the United States for the District of Oregon, praying that they, both as copartners and as individuals be adjudicated bankrupts, and that they be granted a discharge in bankruptcy. This petition was filed on the 30th day of October, 1920. Thereupon an order was made adjudging the appellees bankrupts, both as copartners and individuals, and in due course the matter was referred to Forrest L. Hubbard, Referee in Bankruptcy, at Baker, Oregon.

At a meeting of the creditors, appellant, Charles Bodeau, was elected trustee, and he proceeded to take charge of the assets and property of the bankrupts.

Upon the filing of petitions for a discharge by the bankrupts, a meeting of the creditors was called, and at said meeting the appellant, trustee, was directed and authorized by the creditors to file objections to the discharge of bankrupts.

On the 11th day of July, 1921, appellant made and filed his specifications of objections in said court, as appears from transcript of record, page 16.

It is alleged by the trustee in said specifications of objections, in substance, that the bankrupts, within four months from the date of filing their petition in bankruptcy **knowingly and fraudulently** concealed certain property and assets from the trustee appellant, and **knowingly and fraudulently**, made false statements by reason of a failure

by the bankrupts to include such assets and property in their schedules.

The property alleged to have been knowingly and fraudulently concealed, and knowingly and fraudulently omitted from the schedules of the bankrupts' assets, consists of:

1. The Miller Land.
2. Gas Engine.
3. Mowing Machine.
4. Eight head of cattle.
5. Twelve hundred posts.
6. Account against Mrs. Bastian.

Testimony on the trustees objections and specifications aforesaid was taken before Hon. Forrest L. Hubbard, Referee in Bankruptcy, and thereafter, and on the 8th day of May, 1922, he made and filed in said court his findings of fact and conclusions of law, finding against the bankrupts in regard to all of said specifications of objections, with the exception of the account against Mrs. Bastion. (Transcript of record pg. 34.)

Thereupon appellees, bankrupts, filed in said court their objections to the said findings and conclusions of the referee, (transcript of record pg. 44), and thereafter and on the 17th day of July, 1922, Hon. Robert S. Bean, Judge of said court, made and filed an order therein, in words and figures as follows, to-wit:

"This cause was heard by the court upon objections of the trustee herein and certain creditors

to the discharge of the above named bankrupts, and was argued by Mr. F. W. Packwood and Mr. Bert Henry, of counsel for the bankrupts, and by Mr. A. A. Smith, of counsel for the trustee and said creditors; and the court having considered the said objections and the testimony taken before Forrest L. Hubbard as special master.

"It is ORDERED and ADJUDGED that said objections be and the same are hereby overruled and that said bankrupts be granted a discharge herein."

And on the same day orders were made and filed by the said court granting the appellees, bankrupts, and each of them, a discharge in bankruptcy.

From the judgments and orders of the lower court, appellant has appealed to this court.

Appellant's assignments of error appear in the transcript of record at page 55 thereof, and from an inspection thereof, and from an inspection of the record as an entirety, it will be seen that this is a trial de novo upon the record made before the referee and special master, upon a question of fact solely, that is to say, did or did not the appellees fraudulently and knowingly conceal assets and property and make false statement under oath in reference thereto by failing to include the property above mentioned in their schedules?

It appears from appellant's praecipe for transcript of record on appeal (transcript of record pg. 59,) as well as from the clerks certificate on the

transcript (transcript of record pg. 54), that the praecipe and statement of testimony certified to this court contains only a portion of the testimony taken before the referee and special master.

Upon the serving and filing of appellants praecipe and statement of testimony to be certified to this court, as aforesaid, appellees, bankrupts, by their counsel, made and filed in the court below, objections to the praecipe and statement of testimony to be certified to this court, on the ground that this being a trial de novo on the record, it was necessary that all of the testimony relating to the matters in controversy should be certified to the appellate court, thus making seasonable objection, and giving appellant timely notice of a defective record. The objections just above referred to do not appear in the transcript of record on appeal.

Appellees have served on appellant's counsel, and have filed in this court, their motion, suggesting a diminution of record, and have moved the court to require appellant to cause to have certified here all of the testimony relating to the matters in controversy, and appearing in the record taken before the special master, and that appellant be required to certify to this court appellees objections to said praecipe and statement of testimony, and to have certified to this court the opinion of the lower setting forth his reasons for granting appellees a discharge in bankruptcy.

POINTS AND AUTHORITIES.

I.

"In equity cases in the Federal courts it is not the practice to make findings of fact or conclusions of law.

Whitney vs. Whitney Elevator etc., Co. 180 Fed. 187.

"On appeal form a bankruptcy court to the Circuit Court of Appeals, findings of fact are not required by the bankruptcy act, nor are they desirable."

In re Myers (S.D. N.Y.) 105 Fed. 353.

II.

Evidence—burden of proof on opposition to discharge.

"When it is charged that bankrupts knowingly and fraudulently concealed property and assets in order to defeat a discharge, it must be proved beyond a reasonable doubt, that is, by evidence sufficient to convict the bankrupt of the offense if he were indicted and put upon trial therefor."

In re Henneberry 207 Fed. 882, 885, 886.

7 C. J. (Bankruptcy) 371.

"The burden is upon the objecting creditors to establish **by convincing proof** a charge that the bankrupt, since the adjudication, has concealed from his trustee property belonging to his estate, and that the concealment was **knowingly and fraudulently made.**"

In re Salisbury 113 Fed. 833.
In re Fitchard 103 Fed. 744, 745.
Smith v. Keegan 111 Fed. 157, 158.
1st Fed. Stat. Ann. (2nd ed) 679 (note).

"An objection to a bankrupts discharge because of an alleged concealment of assets must be established by **clear and convincing proof,** and is not the subject of mere suspicion or inference."

In re Howard 180 Fed. 399, 400.
In re Taylor 188 Fed. 479, 484.

III.

"A preference alone, even if it be a voidable one, is not a bar to a discharge. It does not constitute a conveyance of property with intent to delay or defraud creditors."

In re Frederich 199 Fed. 193, 194, 195.

"It is the duty of the appellant to see that the record is properly presented to the lower court."

Williams v. Savage (C.A.A. 4th Cir., 1903).

120 Fed. 497—98—99—500.

"The correctness of findings of fact on a given point is conclusive if the record does not show that it contains all the evidence on that point."

In re Fench 75 Pac. 278.

ARGUMENT.

This is a trial de novo on appeal from the judgments and orders of the court below discharging the bankrupts, and involves solely a question of fact.

The cause was originally tried before the referee in Bankruptcy at Baker, Oregon, upon objections filed by the trustee, appellant here, objecting to a discharge of the bankrupts. Testimony was taken before the referee on the issues made by the objections filed by the trustee and the answer of the bankrupts thereto, the testimony was reduced to typewriting; and upon the testimony and record so made the referee made findings of fact and conclusions of law recommending that bankrupts be denied a discharge.

It was charged in the trustees objections that the bankrupts knowingly and fraudulently, and with fraudulent intent, concealed from the trustee and the bankrupts creditors certain property consisting of (1) Miller land, (2) Gas Engine, (3) Mowing Machine, (4) Eight head of cattle, (5) Twelve hundred posts, (6) Account against Mrs. Bastian; and that the bankrupts knowingly, willfully and with fraudulent intent made false statements on account of failing to include the foregoing property and assets in their schedules of assts in the bankruptcy proceedings.

Bankrupts filed in the court below their objections to the findings of fact and conclusions of law of the referee, and on the 17th day of July, 1922, after argument of respective counsel for and on behalf of the trustee and of the bankrupts, Hon. Robert S. Bean, Judge, rendered his opinion in this cause, which, omitting the title of the court and cause, is in words and figures as follows:

Portland, Oregon, July 17, 1922.

"In the matter of Spiroplos Brothers, these people were adjudged a bankrupt and in due time filed an application for discharge. Exceptions were filed, or objections, to the petition for discharge and the matter referred to a master and he has reported, recommending that the discharge be not granted.

Now, the estate schedules about seventy-nine thousand dollars of liabilities and forty-four thousand dollars of assets, but it is claimed that the bank-

rupts failed to schedule all of their property, or, more strictly speaking, that they concealed part of it from the trustee and that was the only issue in the case.

There are certain items of property that were not scheduled which the creditors claim belong in fact to the bankrupt. There was some cattle, gas engine and mower and some fence posts, amounting in all to three or four—four or five hundred dollars, I don't remember the exact amount—and one hundred and sixty acres of land. But the evidence shows quite clearly that there is a controversy, or was a controversy as to the ownership of this property. The bankrupt claims that it did not belong to him and so testified, and undertakes to explain the source of title, how he came into possession of it and to whom it belonged, and in this he is corroborated by other witnesses.

A mere failure to schedule or surrender property to a trustee is not per se ipso facto knowingly fraudulent within the meaning of the statute, and, therefore, if it be assumed that the evidence is sufficient to show that this property did in fact belong to the bankrupt, nvertheless it is not sufficient to justify the court in refusing to discharge the bankrupt because there is an honest controversy about the matter; and inasmuch as it is at least doubtful and it does not appear clearly that the omission of the bankrupt to schedule this property was due to any fraudulent intent on his part, but rather more

properly to a mistaken view of his rights under the circumstances, the recommendation of the master will be disapproved.

Now, the master finds that this property belonged to the bankrupt and should have been scheduled, but he does not find definitely, as I recall his report, that the failure to schedule was due to any fraudulent intent on the part of the bankrupt to conceal the property from the trustee; and while the report of the referee or special master in a case of this kind is prima facie correct and will not be disturbed unless it is clear that it is not supported by the testimony, I have read this record with great care and I am unable to concur in the conclusion of the master to the effect that the action of the bankrupt in this case was sufficient to justify the court in refusing a discharge."

And on the same day the court below made and entered orders overruling the objections of the trustee in bankruptcy, and granting the bankrupts, and each of them, a discharge.

Counsel for appellant contends in his argument (appellants brief pg. 10) that inasmuch as the court did not disturb the findings of the referee, this court should adopt the findings and conclusions of the referee, and reverse the lower court.

This contention of the appellant is wholly untenable. It is not the practice in equity cases in Federal Courts, nor in bankruptcy cases, on appeal, for the court to make findings of fact or conclusions

of law. They are not required by the bankruptcy act, nor are they desirable. (In re Myers supra). The finding of the court below was and is a general finding, overruling the objections of the trustee to the bankrupts petition for a discharge, and necessarily annulling and setting aside the findings and conclusions of the referee.

Upon a careful consideration of the testimony contained in the transcript before him, and applying the law to the facts shown by the record, Judge Bean was forced to the conclusion that there was not sufficient evidence to substantiate the trustee's objections.

The decided weight of authority is to the effect that where the objections to a discharge of a bankrupt allege the commission of a criminal offence under the Bankruptcy Act, the allegations must be proven **beyond a reasonable doubt,** or at least, **by clear and convincing proof.** (In re Henneberry, 207 Fed. 882, 885, 886; 7 C. J. "Bankruptcy" 371, and other cases cited in appellees brief).

Taking into consideration the testimony and exhibits set forth in appellant's transcript of record, and giving the record the strongest possible construction in favor of appellant, it is not sufficient to prove an inference or suspicion of the fraud and concealment of assets alleged in the trustee's objections; and this will more clearly appear when the whole record is before the court which the appellees have suggested, by motion, to

require appellant to bring up to this court in the proper manner.

In order to attempt to establish the allegations contained in the objections to discharge of the bankrupts, the trustee called George Spiroplos, one of the bankrupts, first on May 26th., and later on June 7th., 1921, and examined this witness at length in regard to the assets and property alleged to have been knowingly and fraudulently concealed from the trustee.

On August 30th and October 24th, 1921, George Spiroplos and John Demas were called as witnesses in behalf of the bankrupts, and each of them testified as to the ownership of the Miller land, the mowing machine and the gas engine, in controversy.

The trustee relies on conflicting statements of George Spiroplos and John Demas in regard to the ownership of the gas engine, the mowing machine and the Miller land.

The record shows that the bankrupts were largely engaged in the sheep business during the period of several years prior to filing their petition in bankruptcy. They had financed several of their countrymen, including John Demas, in the sheep business. About 1917 they financed John Demas, he acquiring about 1000 head of sheep from the bankrupts, giving his note to the bankrupts therefor. It seems that in order to secure a government allottment of grazing land on the U. S. forest reserve it is necessary for the applicant to own land

in his own name, by reason of some rule or regulation of the U. S. land department. Mr. Demas being desirous of securing an allottment upon which to graze his sheep, in the spring of 1918, purchased the Miller land, through George Spiroplos, one of the bankrupts, who advanced the purchase price ($2200.00), the land being subject to a state mortgage of $600.00. This deal was consummated through the First National Bank of Baker, Oregon, and the bank had full knowledge of the transaction; and at this point we desire to call the court's attention to the fact that this bank is the principal creditor of the bankrupts, its claim being secured to a certain extent. The record shows that the title to the Miller land was taken directly from Miller and wife by John Demas, in the spring of the year 1918, at a time when the bankrupts were in good financial condition. The transaction concerning the Miller land was open and known to everybody, including the bank, and was made at a time when it could not be said that it was made to hinder, delay or defraud any creditor of Spiroplos Brothers. Mr. William Pollman, a witness for the trustee, testified that he was President of the First National Bank of Baker; that the Miller lands were put in the name of John Demas in order that he might get a reserve rights as the owner of lands, and that he (Pollman) was requested to go to the Forestry office, which he did, to try and secure a reserve right for Mr. Demas (original transcript of testimony pg. 102).

It appears from the testimony (original transcript of testimony of George Spiroplos pages 137 to 154 thereof), that it was customary for Demas and other countrymen of the bankrupts, who had been financed by the bankrupts, to order goods, wares and merchandise through Spiroplos Bros., and to have shipments made and charges made to Spiroplos Brothers. It appears that the mowing machine and gas engine was ordered from the Kleinschmidt Hardware Company, at Baker, Oregon, and it also appears that said company in filling such orders sometimes had shipments made from Nampa and Caldwell and other points in Idaho (evidently on account of cheaper freight rates).

There is some slight conflict in the testimony of John Demas and George Spiroplos in regard to who ordered the gas engine, but the court will take into consideration the fact that these witnesses were testifying in regard to transactions occurring some two years and more prior to the time their testimony was taken and received in this cause, and on the various and different times on which they testified as above set forth it is only reasonable that they might remember the transactions in a different way. The court is not concerned with non-essentials, and is only concerned with the fact as to the ownership of the property and assets in controversy. It matters not how a thing was accomplished, if it was in fact accomplished. The trustee contented himself with the testimony of George

Spiroplos and John Demas. He did not call any other material witnesses except Mrs. McBirney and E. V. Daniels, and the effect of their testimony is that Spiroplos Brothers ordered and paid for the gas engine. As we have stated, and it is a fact, that everything was either ordered by Spiroplos Brothers or through them; that they kept no books, but that once a year, when the wool and lambs were sold, a settlement was made, and then the bills for which Demas was chargeable were paid from the wool and lamb money. It appears that Demas, Spiroplos Bros., and others interested in the same way shipped their wool and their lambs together, and that the money was remitted to and a settlement made at the First National Bank.

The burden of proof was on the trustee to prove his case by clear and convincing proof. He failed to call any of the bankrupts except George Spiroplos. He failed to call any of the officers of the bank to disprove the Miller land transaction, if his contention is true, except that he did call Mr. Pollman who testified as we have above outlined.

It was necessary for John Demas to own land in order to secure a forest reserve grazing right, not as trustee for Spiroplos Brothers, but as absolute owner. This Mr. Pollman well knew, and he undertook to secure such a right for Demas.

The trustee failed to call Miller and his wife in regard to the Miller land transaction, or to show by them that there was a mowing machine on the

Miller ranch when it was sold. He failed to call Chris Coleman to show the ownership of the gas engine.

It appears that George Spiroplos, or Spiroplos Brothers advanced the money for the purchase price of the Miller land for John Demas, and that it was some time before this amount was repaid, and that Spiroplos claimed some kind of an equity in the land, or believed that they had, until the money was repaid, and that they mortgaged the land with other land to the bank, and it was listed in the inventory, and in other estate papers of the estate of Nick Spiroplos; but both George Spiroplos and John Demas testify that the land was purchased for John Demas, in order that he could have land in his own name to secure a grazing right. This testimony is undisputed, and is corroborated by William Pollman, president of the bank. The record shows that the purchase price of the Miller land was repaid through a settlement on account of wool and lamb money received for the parties by the bank; and the record further shows and it is undisputed that the bank received $5300.00 belonging to John Demas, over and above everything that Demas owed, and still holds and retains that amount, having applied the same on the debt of Spiroplos Brothers, without authority. If the claims of George Spiroplos and John Demas were untrue in regard to this settlement in the bank, why didn't the trustee show the fact by the

books of the bank, and the testimony of the officers of the bank having custody thereof?

John Demas testified to buying the mowing machine in controversy from the Kleinschmidt Hardware Company. That he had just bought the Miller land, and there was no mower on the land. There can be no doubt in the minds of the court as to this transaction when we refer the court to the testimony of V. Nicoleascu, a witness called on behalf of the bankrupts, and who testified that in the spring of the year, 1918, he was working near Home, a small station on the branch line of the O. S. L. Railroad, and that he assisted John Demas to unload a mowing machine from a railroad car at that point, and saw John Demas hitch his team to the mower and take it away. If this fact was not true, it was an easy matter to show by the records of the Railroad Company, and by its agent that no such shipment had in fact been made. It seems to us that there can be no question about the ownership of this mower having been in John Demas. An examination of the entire record will show this even more clearly. The record shows that the bankrupts owned the Flick Ranch, and that there were only two mowers on the Flick ranch, and that these mowers had been used several years. Counsel was unable to find that Spiroplos Brothers had bought any other mowing machines; neither could counsel find that a mower had been shipped to Demas from Baker, by the Kleinschmidt Hardware Company;

but when the testimony shows, as it does in this case, that said company at times shipped machinery and other articles through some of its correspondents in Idaho to the bankrupts and others, this testimony of counsel fails utterly to have any material significance.

As to the cattle there is no dispute about them. The record shows that they were given, or the original cattle, were given to Mrs. George Spiroplos by her mother before marriage. That these cattle increased, and were given to her children by Mrs. Spiroplos, and it conclusively appears that the bankrupts never owned any of the cattle which were sold by the bankrupts.

Taking the record of testimony as a whole, and applying the law to the facts, there was no evidence sufficient to justify the referee in making findings of fact and conclusions of law against the bankrupts

We respectfully insist that the orders and judgments of the court below should be in all things affirmed.

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J. B. MESSICK,
Attorneys for Appellees.